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CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1031

[CPSC Docket No. CPSC-2013-0034]

Commission Participation and Commission Employee Involvement in Voluntary Standards Activities

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The United States Consumer Product Safety Commission (“Commission” or “CPSC”) is issuing this final rule to amend the existing regulation on Commission participation and employee involvement in voluntary standards activities. Currently, Commission rules allow employees to participate in voluntary standard development groups on a non-voting basis and do not allow Commission employees to accept leadership positions in voluntary standard development groups. This final rule removes these restrictions and allows Commission employees to participate as voting members and to accept leadership positions in voluntary standard development groups, subject to prior approval by CPSC’s Office of the Executive Director (“OEX”).

DATES: The final rule will become effective on [INSERT DATE THAT IS 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Introduction

Many consumer products under the Commission's jurisdiction are covered by voluntary standards. Voluntary standards provide safety provisions addressing potential hazards associated with consumer products found in locations such as homes, schools, and recreational areas. Developing voluntary standards may involve multiple revisions to a standard within 1 year, or over multiple years. Voluntary standards development activities for consumer products within the Commission's jurisdiction are handled primarily by three standards development/ coordinating organizations: ASTM International (previously called the American Society for Testing and Materials), the American National Standards Institute ("ANSI"), and Underwriters Laboratories Inc. ("UL"). Along with industry, consumer groups, and product safety experts, CPSC staff works with these and other organizations to coordinate the development of voluntary standards.

Currently, CPSC staff provides technical support to organizations that coordinate the development of voluntary standards. According to the CPSC's Voluntary Standards Activities FY 2014 Annual Report, CPSC staff provided technical support or monitored voluntary standards activities for 83 products in FY 2014. Staff participates in the voluntary standards development process by providing expert advice, technical assistance, and information, based on analyses of the numbers and causes of deaths, injuries, or incidents associated with a product. Staff may also conduct CPSC research, perform laboratory tests, and provide draft language for a voluntary standard.

The Commission's involvement and staff's participation in voluntary standards activities are governed by the Commission's rule at 16 CFR part 1031, Commission Participation and

Commission Employee Involvement in Voluntary Standards Activities (“part 1031”). Part 1031 prohibits CPSC staff from voting and precludes staff from holding leadership positions in voluntary standards development groups. This final rule amends part 1031 to eliminate these prohibitions and allows CPSC staff to vote and hold leadership positions on an optional basis, provided that such activities have the prior approval of the CPSC’s OEX.

A. Statutory and Regulatory Background

The Consumer Product Safety Act (“CPSA”) gives the Commission authority to promulgate mandatory safety standards for consumer products. 15 U.S.C. 2056(a)(1)(A). The Commission issued regulations in 1978, describing the extent and form of Commission involvement in the development of voluntary standards (43 FR 19216 (May 4, 1978)). Acknowledging the contribution that voluntary standards had made to reducing hazards associated with consumer products, the Commission stated its support for an effective voluntary standards program, finding that a proper combination of voluntary and mandatory standards can increase product safety better than either mandatory or voluntary activities alone.

In 1981, Congress amended the CPSA, the Federal Hazardous Substances Act (“FHSA”), and the Flammable Fabrics Act (“FFA”), to, among other things, mandate that the Commission give preference to voluntary standards, as opposed to promulgating mandatory standards, if the Commission determines that a voluntary standard would eliminate or adequately reduce an unreasonable risk of injury and there will likely be substantial compliance with the voluntary standard. 15 U.S.C. 2056(b), 15 U.S.C. 1262(g)(2), 15 U.S.C. 1193(h)(2). In 1989, the Commission adopted regulations to reflect the policies set forth by the 1981 amendments, making several changes in the agency’s policies on employee participation in voluntary standards development activities. The 1989 amendments also combined parts 1031 (on

employee membership and participation) and 1032 (on Commission involvement) into a revised part 1031, titled, Commission Participation and Commission Employee Involvement in Voluntary Standards Activities. 54 FR 6646 (Feb. 14, 1989).

In 2006, the Commission amended several provisions of part 1031. 71 FR 38754 (July 10, 2006). Among other things, the 2006 amendments provided that Commission employees only participate in voluntary standards efforts consistent with the Commission's priorities identified in the Commission's operating plan, performance budget, mid-year review, or other official Commission document. In addition, the Commission added a requirement that employees with ongoing participation in voluntary standards activities report regularly to the Voluntary Standards Coordinator, to help ensure ongoing oversight and coordination. Lastly, the 2006 amendments added a requirement that the CPSC provide notice and the opportunity for the public to comment on staff's positions on voluntary standards activities.

B. Recent Statutory Changes Involving Voluntary Standards

In the past, CPSC staff typically served on voluntary standards committees based on the Commission's priorities. Staff participated without any expectation that such voluntary standards would necessarily form the basis of a mandatory standard. The Consumer Product Safety Improvement Act of 2008 ("CPSIA"), however, gave rise to the expectation that, for certain children's products, voluntary standards would form the basis for mandatory standards development. For example, section 104(b) of the CPSIA requires the Commission to promulgate consumer product safety standards for durable infant or toddler products. These standards are to be "substantially the same as" applicable voluntary standards or more stringent than the voluntary standard, if the Commission determines that more stringent requirements would further reduce the risk of injury associated with the product.

Congress also has addressed participation by federal agencies in voluntary standards development. Public Law 104-113 directed federal agencies to “use technical standards that are developed or adopted by voluntary consensus standards bodies” and to “participate with such bodies in the development of technical standards.” Pub. L. 104-113, 12(d)(1) & (2), 110 Stat.775, 783 (1996), 15 U.S.C. 272 note. Congress anticipated that federal agencies would “work closely” with voluntary standards organizations, that these organizations would “include active government participation,” and that agencies would “work with these voluntary consensus bodies, whenever and wherever appropriate.” H.R. Rep. 104-390 at 15, 25 (1995). *See also* 141 Cong. Rec. H14334 (daily ed. December 12, 1995) (Statement of Rep. Morella).

C. GAO Report

On May 16, 2012, the U.S. Government Accountability Office (“GAO”) issued a report titled, “Consumer Product Safety Commission: A More Active Role in Voluntary Standards Development Should Be Considered” (“GAO Report”) (available at: <http://www.gao.gov/assets/600/590990.pdf>). The GAO Report recommended that the Commission review its policy for staff participation in voluntary standards development activities and determine the feasibility of agency staff assuming a more active, engaged role in developing voluntary standards. Specifically, the GAO Report recommended that CPSC staff be allowed to vote on balloted provisions of voluntary standards and to hold leadership positions at various levels of standards development organizations, including task groups, subcommittees, or committees. GAO concluded that changing the CPSC’s regulations to allow staff to participate more actively in voluntary standards activities, especially when working with technical committees for which CPSC staff can provide expertise, and permitting CPSC staff to vote on voluntary standards, could result in stronger voluntary standards, without compromising the CPSC’s independence.

D. Notice of Proposed Rulemaking

In response to the GAO Report recommendations, the Commission issued a proposed rule (“NPR”) to remove the prohibitions on CPSC staff participating as voting members and accepting leadership positions in voluntary standard development groups. 78 FR 57818 (Sept. 20, 2013). The NPR proposed that CPSC staff participation in such activities would receive prior approval by OEX. The preamble to the NPR stated that when approving staff’s participation in such activities, OEX should consider the policy concerns set forth in 16 CFR 1031.9 (appearance of preferential treatment, loss of impartiality, compromise of the agency’s independence, and a real or apparent conflict of interest) and balance these concerns against Commission priorities, available resources, the need for greater staff involvement, and the efficiency of the voluntary standards process. 78 FR at 57820. The NPR stated that OEX would evaluate each request for staff to participate as a voting member or to accept a leadership position on a case-by-case basis. Additionally, the preamble to the NPR stated that OEX would authorize staff to vote on actions for a specified voluntary standard but would not be approving each individual vote. *Id.*

E. Rationale for the Rule

The Commission is finalizing the proposed rule without any changes. As discussed in the preamble to the NPR, the Commission believes that permitting CPSC staff the option to vote on a voluntary standard and/or accept a leadership position in a voluntary standard development group may result in a more effective voluntary standards process and accelerate standards development and implementation, without compromising the CPSC’s independence. Such participation could gain CPSC staff additional access to and familiarity with the latest technologies, and will provide an opportunity for staff to help establish standards that will advance CPSC’s safety goals. In addition, “full” federal government participation in standards

development increases the likelihood that the standards can meet both public and private sector needs. 141 Cong. Rec. H14334 (daily ed. December 12, 1995) (Statement of Rep. Morella).

Additionally, optional staff participation in voluntary standard development groups by voting and taking leadership roles is consistent with the guidance in OMB Circular A-119 Revised, “Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities” (February 10, 1998). Among other things, OMB Circular A-119 encourages agency representatives serving as members of voluntary consensus standards bodies to “participate actively and on an equal basis with other members,” and to “vote . . . at each stage of the standards development process unless prohibited from doing so by law of their agencies.”

When participating as a voting member of, or in a leadership position on, a voluntary standard development group, the Commission directs CPSC staff to indicate clearly that any views expressed in connection with such participation represent CPSC staff’s position and may not necessarily represent the Commission’s position. Making such a disclaimer is consistent with current staff practice regarding representations in oral and written presentations and staff documents intended for public release. In these contexts, CPSC staff’s views cannot serve as a proxy for the Commission’s or the agency’s views on any particular issue, as stated in the final rule at § 1031.11(c). Similarly, CPSC staff serving in leadership positions on a voluntary standard development group will act in their capacity as CPSC staff members, and their views will not necessarily represent the views of the Commission. In particular, the Commission warns that CPSC staff participation in a voluntary standard development group, even in a leadership position, does not provide any assurance that the Commission will support the resulting voluntary standard.

Removing prohibitions on employees voting and serving in leadership positions should not result in the Commission compromising the policy concerns set forth in § 1031.9. Generally, before any substantive issue is balloted on a voluntary standards committee, the committee is given the opportunity to discuss the proposals in detail. Currently, Commission staff engages in these discussions, such that the technical opinions of staff are known before a proposed change in a voluntary standard is balloted. Accordingly, CPSC staff's ability to vote on such ballots should not fundamentally alter current procedures in a manner that impinges on the Commission's independence. Rather, staff's ability to vote on a voluntary standard may improve the credibility and efficiency of the standard. Additionally, not only can OEX consider policy concerns when deciding whether to authorize staff participation in voluntary standards activities as voting members or in leadership roles, but OEX's approval also can impose constraints or limitations tailored to specific circumstances, such as measures to avoid undue influence or any appearance of impropriety.

Finally, to serve in a leadership position on a voluntary standards development group, CPSC staff must agree to follow the procedures set forth by the voluntary standards development group for leadership positions. Staff's leadership role may involve helping the development group to run more smoothly and assisting the committee in achieving timely deliberations.

II. Response to Comments

CPSC received 14 comments regarding the NPR that address 29 separate issues. Comments submitted in response to the NPR are available at: www.regulations.gov, by searching under the docket number of the rulemaking, CPSC-2013-0034. We summarize the comments received on the NPR and CPSC's responses below. To make identification of the comments and our responses easier, we numbered the comments and responses, and placed the

word “Comment” before each comment summary, and the word “Response” before the Commission’s response.

A. Support for Greater Staff Participation in a Voting Capacity or in a Leadership Role in Voluntary Standards

Comment 1: A commenter noted that, “involvement of CPSC personnel in voluntary standards activities ensures that the agency and other affected stakeholders (standards developers, industry, consumers, etc.) can address safety needs in an open forum, thereby reducing the likelihood that mandatory rulemaking will be necessary. Such rulemaking is often time-consuming, can preclude more robust stakeholder input and participation, and may not be able to react and adapt to changing market dynamics on a rolling basis.” Other commenters echoed the conclusion that staff engagement produces “better, more protective and timelier voluntary standards” and those members with voting privileges are often more engaged in the process.

Response 1: The Commission agrees that there are benefits to staff participation in voluntary standards organizations. Staff participation in a voluntary standards body facilitates more open, efficient interactions with stakeholders and such communication with stakeholders yields effective injury-prevention strategies for consumers. Sometimes, staff’s participation in the voluntary standards process may be more efficient and timely in reducing safety hazards than mandatory rulemaking. For example, the ability to update standards quickly is an important benefit of voluntary standards. However, the ability to create mandatory rules is an important part of product safety. The Commission, not CPSC staff, generally determines when to follow a voluntary standard and when to initiate rulemaking, often based on staff’s recommendations. Together, staff’s participation in voluntary standards development and the Commission’s

rulemaking ability help fulfill the Commission's mission to prevent serious injury and death to consumers from unreasonable risks associated with consumer products. The Commission previously observed that an effective voluntary standards program, along with mandatory standards, can increase product safety better than either mandatory or voluntary standards alone (43 FR 19216 (May 4, 1978)).

Comment 2: A commenter expressed concern that staff's inability to "officially" represent CPSC in voluntary standards development activities might be perceived negatively by other standards development group participants who expect that individuals in the group represent the views of their organizations.

Response 2: CPSC staff currently provides input to voluntary standards development groups; this input represents the views and expertise of Commission staff, not the Commission. The fact that staff cannot represent the views of the Commission will not change if staff participates in voting. Leadership responsibilities in a voluntary standards organization are determined by each organization and generally require impartiality. A CPSC staff leader will be subject to all the rules and regulations of the voluntary standards, as any other member in the same role.

Comment 3: A commenter noted that staff from the U.S. Environmental Protection Agency ("EPA") participates and votes in voluntary standards development groups and has held leadership positions.

Response 3: As GAO's report noted, CPSC's existing policy on voting and holding leadership positions in voluntary standards organizations is more restrictive than OMB's guidance on voluntary standard's participation in OMB Circular A-119 Revised, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity

Assessment Activities” (February 10, 1998). Each agency independently decides on an appropriate policy for voluntary standards activities.

B. Concerns with Greater Staff Participation in a Voting Capacity or in a Leadership Role in Voluntary Standards

Comment 4: Some commenters stated that allowing staff to vote in voluntary standards development activities would “compromise the CPSC’s objectivity and have a ‘chilling effect’ on candid discussions needed to develop the most effective standards.” The commenters do not see the benefit of allowing staff to vote when an “abstention with comment” serves to provide substantive staff input.

Response 4: Staff currently expresses its opinions of ballot items in voluntary standards development activities through an abstention with comment, participation in meetings, email communications, conference calls, and formal letters submitted to the standards development groups. At this time, the Commission is not aware of any instances in which expressions of opinion adversely affected discussions. Allowing staff to express staff’s views through a vote may increase the speed and efficiency of staff communicating during standards development meetings. In addition to ballot votes, dozens of proposals can be made and voted on during any given standards development meeting. Allowing staff to cast a vote like other members can provide instant feedback about staff opinions.

Comment 5: A commenter expressed concern that CPSC staff’s negative vote could effectively negate the legitimacy and effectiveness of an entire standard, even when a standard has the full support of an entire committee. The commenter expressed concern that allowing CPSC staff to vote could cause manufacturers to decline altogether from participating in voluntary standards development.

Response 5: The Commission disagrees. Staff regularly expresses its approval or disapproval of proposals in presentations and letters during standards development activities, usually verbally, but often in the form of a written “abstention with comment.” Even when staff provides negative feedback, voluntary standards development groups continue their work.

Comment 6: Several commenters suggested that any CPSC staff position on a subject could be seen as an official Commission position, implying that staff’s usual disclaimer cannot be effective. One commenter stated that the Commission should vote on every position taken by a staffer and expressed concern that a CPSC staff member stating a view that was “materially different from one or more Commissioners, could create a conflict with an ultimate Commission determination.”

Response 6: The Commission is comprised of five individual Commissioners. Accordingly, every Commissioner may not always agree with the recommendations or opinions of staff. The Commission’s official position is determined by a majority vote of the five Commissioners. CPSC staff routinely expresses its opinions about proposals in voluntary standards activities with the disclaimer that staff cannot represent the Commission’s opinions. The disclaimer that staff cannot “represent the views of the Commission” is generally understood within voluntary standards organizations and will be included as part of the comments attached to a staff vote if there is any indication that staff opinion could be misinterpreted as representing the views of the Commission.

Comment 7: A commenter noted that CPSC’s current policy preventing staff from voting in and leading voluntary standards activities ensures that the CPSC “maintain[s] its independence as an impartial participant . . .”

Response 7: The Commission’s decision to permit the option for staff representatives to vote or hold leadership positions should not prevent the Commission from maintaining its independence. CPSC’s regulation at 16 CFR 1031.13(e) states: “Involvement by Commission officials and employees in voluntary standards bodies or standards-development groups does not, of itself, connote Commission agreement with, or endorsement of, decisions reached, approved or published by such bodies or groups.” The final rule requires OEX to approve staff participation, and to consider whether “loss of impartiality” would be an issue in each case.

Comment 8: A commenter asserted that having staff in leadership positions of voluntary standards development groups would have “a chilling effect” on participation because, “it is difficult to believe that any manufacturer representative would ever risk the ire of CPSC (a potential enforcement action?) against its company by voicing disagreement with a CPSC committee or subcommittee chair or voting against a CPSC position.”

Response 8: According to CPSC staff, staff’s experience participating in voluntary standards development groups does not support the commenter’s claim. CPSC staff regularly engages in full and vigorous debates about staff’s views in standards development meetings where a subcommittee disregards or votes against CPSC staff’s position. Organizations, such as ASTM, have stated that leaders are subject to rules that maintain the development of consensus standards in accordance with rigorous democratic procedures that ensure open and balanced participation, due process, and consensus. Members may monitor, critique, and correct any actions of a subcommittee or task group chairman according to the rules and by-laws of the standards development organization. Additionally, although each organization may differ, leaders are nominated and appointed according to the standards development organization’s rules and procedures. For example, UL employs UL staff to lead UL’s standards technical panels.

ASTM members elect a chairman who appoints subcommittee chairmen from the general membership, subject to the approval of ASTM's Executive Subcommittee (Section 6.3.1, ASTM, 2013).¹ Task group leaders are appointed during subcommittee meetings.

Under the final rule, CPSC staff could be nominated and appointed to leadership roles only after the approval of the standards development organization that makes the invitation. OEX will subsequently need to approve staff participation. The final rule gives standards development organizations the option to offer a leadership role to CPSC staff and for OEX to review and approve each offer on a case-by-case basis. Furthermore, execution of a leadership role is subject to the bylaws of the pertinent standards development organization, many of which require impartiality of people in leadership positions.

Comment 9: Commenters argued that having CPSC staff in a leadership role in a voluntary standards development group could create the practice or appearance of undue influence if staff is allowed, for example, to schedule meetings, set agendas, and decide the direction of the conversation on the voluntary standard.

Response 9: Standards development organizations have rules and bylaws that govern and protect the validity of their respective consensus-building procedures. Although the leader of a committee can have influence over the scheduling of meetings and discussions, the agenda and direction of the conversation are governed and selected by the committee members. Every proposal made by a member of the group must be voted on and approved by the members, and any irregularities in procedures are open to challenge by any member, as specified in the standards organization's rules of conduct or bylaws. Chairmen or other leaders cannot dictate

¹ <http://www.astm.org/COMMIT/Regs.pdf> - ASTM International, *Regulations Governing ASTM Technical Committees*, 100 Barr Harbor Drive, West Conshohocken, PA, October, 2013.

the content or wording of a voluntary standard, nor can they move proposals forward without group consensus. Removing the prohibition will not alter or affect these rules and principles.

Comment 10: A commenter asserted that the Commission has not shown “a reason why prohibiting staff from accepting leadership positions is no longer necessary.” Another commenter termed the reasons for the proposed rule, “a mystery.”

Response 10: As noted above, a GAO report recommended that the Commission review its policy for participating in voluntary standards development activities and determine the feasibility of agency staff assuming a more active, engaged role in developing voluntary standards. The GAO concluded that CPSC had interpreted its level of participation more strictly than OMB guidance specified for activities such as voting on standards and taking leadership positions. Other participants in voluntary standards development activities familiar with CPSC contributions agreed with OMB that “earlier and more active participation could increase CPSC’s efficiency and effectiveness in developing standards” (p. 10, GAO-12-582). After reviewing the GAO report, the Commission agreed with CPSC staff, that in certain limited circumstances, if CPSC staff is allowed to vote or serve in leadership positions, CPSC staff’s participation may advance efficient development of safety standards. Importantly, removing the prohibition against these activities from part 1031 does not require CPSC staff to vote or to serve as leaders; however, removing the prohibition does provide a framework for CPSC to consider, on a case-by-case basis, whether staff should undertake such activities.

C. Potential Legal Issues with Greater Staff Participation Identified by Commenters

Comment 11: Several commenters argued that allowing staff members to vote would “usurp the regulatory process, effectively allowing the CPSC to develop a *de facto* ‘mandatory standard’ outside of the notice and comment rulemaking process in violation of the

Administrative Procedures Act, as such vote would likely be given significant weight.” The commenters further asserted that, if staff assumes a leadership role in a voluntary standards development group, such a role would equate to an “end run” around the normal rulemaking safeguards that are needed to give small businesses a voice in the creation of a mandatory rule.

Response 11: The Commission disagrees. Voluntary standards are not mandatory standards. Allowing staff to serve in leadership positions in a voluntary standards development group will not alter or circumvent any procedures for mandatory rulemaking. If the Commission engages in mandatory rulemaking, the Commission will continue to follow the appropriate notice and comment rulemaking procedures.

Comment 12: A commenter noted that the CPSIA requires the Commission to make some voluntary standards into mandatory rules and expresses concern that a “blurring” is occurring between the needed distinction between voluntary standards versus CPSC-mandated regulations. The commenter is concerned that this perceived “blurring” of the distinction between voluntary and mandatory standards is a “slippery slope that could undermine the legitimacy, independence, and effectiveness of the entire voluntary standards framework.”

Response 12: Several provisions of the CPSIA mandated or provided for the Commission to adopt as mandatory regulations, certain voluntary standards, such as those for toys, durable infant and toddler products, and all-terrain vehicles. In these circumstances, there is a closer link between voluntary standards and mandatory CPSC standards than in other situations. However, the Commission follows appropriate rulemaking procedures when issuing a mandatory rule and clearly distinguishes between the staff’s activities with a voluntary standards development group and the Commission’s promulgation of a mandatory rule. Allowing staff to hold leadership positions or vote will not conflict with the rulemaking process.

Most of CPSC staff's work with voluntary standards groups is outside of the unique circumstances of these provisions of the CPSIA and does not involve any rulemaking activity. Staff is engaged in the voluntary standards process for a range of other consumer products. Rather than "undermining the legitimacy" of the voluntary standards framework, CPSC staff, in addition to stakeholder engagement in the voluntary standards process, has added to the legitimacy and credibility of the voluntary standards process. Participation by all concerned stakeholders collectively to develop safety standards is the most effective way to mitigate the risk of injury through the sharing of information, such as testing and data.

Comment 13: A commenter suggested that the language of the NPR sounds like the Commission believes that voluntary standards development is "some kind of precursor to mandatory rulemaking or a substitute for an Advanced Notice of Proposed Rulemaking ("ANPR")."

Response 13: In the case of section 104 of the CPSIA, voluntary standards are the basis for the Commission's rulemaking for a durable infant or toddler product. Congress required the Commission to issue mandatory rules for certain durable infant and toddler products that are substantially the same as, or more stringent than, the voluntary standard for such products. Congress directed the Commission to issue such rules under section 553 of the Administrative Procedure Act ("APA"), rather than the Commission's rulemaking authority under sections 7 and 9 of the CPSA. In effect, Congress directed certain juvenile product voluntary standards to become precursors of mandatory rules, but still required the Commission to use notice and comment rulemaking to make such standards mandatory rules. Congress also made voluntary standards for both toys and ATVs mandatory CPSC rules.

Voluntary standards are important to CPSC, as demonstrated by the large number of voluntary standards committees staff participates in annually. However, staff involvement in a voluntary standard committee is not a precursor to a mandatory rule. When the Commission engages in rulemaking under the CPSA, the Commission must consider the efficacy of any existing voluntary standards to address the risk of injury or death identified, and whether products substantially comply with the voluntary standard.

Comment 14: A commenter stated that the proposed rule would have a “chilling effect” on participating in the development of standards because “. . . the plaintiffs’ bar will likely attempt to argue in product liability cases that a negative CPSC vote suggests that a voluntary standard (that was properly adopted through, for example, the ANSI or ASTM process) is still ‘unsafe.’”

Response 14: If lawyers wanted to make an argument based on an individual CPSC staffer’s opinion, lawyers could do that today, based on staff’s communications with a voluntary standards development group. Staff regularly and openly expresses opinions about voluntary standards in documents easily obtained and during open meetings. Expressing the same opinion in a vote will not change this dynamic.

Comment 15: A commenter stated that one of the provisions of the *Regulations Governing ASTM Technical Committees* (Section 19.2.5) is that “. . . no subcommittee or task group shall make any effort to bring about the standardization of any product or service for the purpose or with the effect of (a) preventing the manufacture or sale of any product or service not conforming to a specified standard. . . .” The commenter argued that agency staff would violate this ASTM requirement if the proposed rule were approved.

Response 15: The Commission disagrees with the commenter. CPSC staff's voting or holding leadership positions will have no effect on ASTM's requirements or procedures used for standards development. All members, including CPSC staff participating in the ASTM subcommittees are required to follow the rules of standard development set out by ASTM.

Under the CPSA, the Commission must rely on a voluntary consumer product safety standard rather than promulgate a mandatory standard when compliance with the voluntary standard would eliminate or adequately reduce the risk of injury and it is likely there will be substantial compliance with the voluntary standard. Under section 104 of the CPSIA, the Commission is required to issue a mandatory regulation for certain durable infant or toddler products that is the same as, or more stringent than, the voluntary standard if the Commission determines that more stringent standards would further reduce the risk of injury associated with such products. Contrary to the commenter's assertion, voluntary standards do not "immediately become a mandatory standard." The Commission can only issue a final mandatory rule if the Commission follows the notice and comment rulemaking procedures under the APA or is otherwise instructed by Congress. Rulemaking can occur in parallel to the voluntary standards development process, but cannot be replaced by the voluntary standards development process.

Comment 16: One commenter recommended that, if staff is given the opportunity to vote on a ballot item, and staff casts a negative vote that is later deemed nonpersuasive by the subcommittee, then staff's recommendation or suggestion should not be included in any final mandatory standard that incorporates the standard by reference.

Response 16: This comment refers to the ASTM practice of allowing a subcommittee to find a negative vote nonpersuasive, thereby overriding the negative vote and allowing a ballot to pass, even though the ballot does not have the consensus of all voters. The commenter is

confusing the roles of CPSC staff and the Commission. CPSC staff's opinions and suggestions are just that, they are the staff's opinions and suggestions, not the opinions and suggestions of the Commission. The creation of a mandatory standard, even one with origins in a voluntary standard, is separate from voluntary standards development and requires action by the Commission. Neither opinions of CPSC staff, nor the opinions of the standards organization members, can bind the Commission to any decision about a mandatory standard. CPSC rulemaking must be conducted following the appropriate statutory rulemaking procedure. Furthermore, the commenter's suggestion goes against separation of the voluntary and mandatory standards processes discussed previously.

Comment 17: Commenters suggested that staff leadership and voting in voluntary standards development activities might activate certain requirements of the APA. These requirements "could hinder or cripple the process" of developing a standard.

Response 17: CPSC staff voting and/or accepting a leadership position in a standards development organization does not implicate the APA. Procedural requirements of the APA do not apply to voluntary standard proceedings but only to rulemaking undertaken by the Commission through its statutory procedures.

Comment 18: A commenter suggested that staff leadership in standards development activities might trigger the need to follow the Federal Advisory Committee Act ("FACA").

Response 18: FACA is not implicated by CPSC staff serving in a leadership position in a voluntary standards development group. FACA defines an "advisory committee," in relevant part, as one that is "established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . ." 5 U.S.C. 3 App. 2. Voluntary standards organizations, committees, and

subcommittees are not “established or utilized” by the Commission or CPSC staff. Voluntary standards committees exist to create and revise voluntary standards, irrespective of whether CPSC staff serves in a leadership function. Additionally, neither the Commission, nor staff, is establishing or utilizing a voluntary standards development group to advise the agency on any matter.

Comment 19: A commenter suggested that staff leadership roles might trigger certain requirements of the Sunshine Act (“SA”), such as calendar notices and the accommodation of additional public participation beyond members who regularly contribute to standards development activities. The commenter was concerned that SA obligations would suppress participation and raise the costs of holding meetings for standards development organizations.

Response 19: The SA, 5 U.S.C. 552b, does not apply to staff serving in leadership positions in a voluntary standards development group. As provided in the Commission’s regulations implementing the SA, 16 CFR 1013.1, SA requirements only apply to Commissioners, not to staff. The CPSC does have a meetings policy for the agency that applies to CPSC staff, as well as Commissioners. 16 CFR part 1012. The meetings policy fosters transparency and openness. Under the meetings policy, certain meetings involving CPSC staff (such as meetings concerning the development of voluntary standards) must be open to the public and must be noticed in CPSC’s public calendar. The Commission’s voluntary standards regulations at 16 CFR part 1031 explicitly reference and incorporate the meetings policy requiring CPSC employees to comply with applicable provisions. 16 CFR 1031.11(f) and 1031.13(c). CPSC staff has followed this meetings policy since its 1981 implementation when participating in the voluntary standards development process, including routinely posting

voluntary standards organization meeting notices on the CPSC’s public calendar and creating meeting logs to record participation.

Comment 20: A commenter wrote that staff participation on technical committees “could impede the ability of these committees to function effectively by precluding industry participants from discussing or disclosing privileged information.” The commenter recommended allowing technical committee meetings to be closed to the public to facilitate “the open, honest dialogue and self-critical analysis that are the cornerstones of voluntary standard development.”

Response 20: The final rule allows CPSC staff to vote on ballot items and to hold leadership positions. These revisions do not alter standards organizations’ procedural rules or the CPSC’s meetings policy (discussed in the previous response).

D. Other Procedural and Burden Considerations

Comment 21: A commenter recommended that CPSC staff engagement be consistent with the Office of Science and Technology Policy (“OSTP”) guidance,² namely:

1. Produce timely, effective standards and efficient conformity assessment schemes that are essential to addressing an identified need;
2. Achieve cost-efficient, timely, and effective solutions to legitimate regulatory procurement and policy objectives;
3. Promote standards and standardization schemes that promote and sustain innovation and foster competition;
4. Enhance U.S. growth and competitiveness and ensure non-discrimination, consistent with international obligations; and

² Principles for Federal Engagement in Standards Activities to Address National Priorities (Jan. 17, 2012), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-08.pdf> (last accessed March 25, 2014).

5. Facilitate international trade and avoid the creation of unnecessary obstacles to trade.

The commenter also recommended that CPSC staff only accept leadership positions when the standard is a national priority and consistent with CPSC's current operating plan. Even then, the commenter recommended that leadership roles should be the exception, not the rule.

Response 21: The Commission believes that the final rule will contribute to the objectives outlined in the OSTP guidance. OEX will approve staff participation on a case-by-case basis, based on the considerations outlined in the rule. The Commission expects that standards organizations will only extend an invitation for staff to take leadership positions during exceptional circumstances because many willing standard organization members are often available for taking leadership roles in standards organizations.

Comment 22: Another commenter suggested that the Commission should be involved in the decision to approve staff participation because it is a policy decision, not just a budgetary concern.

Response 22: The Chairman, not the Commission, is responsible for allocating staff resources. 15 U.S.C. 2053(f)(1). The Executive Director, as chief operating officer, manages staff's work. 16 CFR 1000.18. Staff's work includes participation in voluntary standards activities, whether on a voting or non-voting basis and whether in a leadership or non-leadership capacity.

Comment 23: A commenter questioned the criteria OEX would apply to determine when it was advisable for staff to participate actively in a standards initiative. What rules for gaining approval would be set and what criteria would OEX apply in the decision?

Response 23: OEX will approve staff participation on a case-by-case basis, based on the considerations outlined in the rule, namely the policy concerns set forth in 16 CFR 1031.9:

- an appearance of preferential treatment,
- loss of impartiality,
- compromise of the agency's independence, and
- a real or apparent conflict of interest.

Policy concerns in 16 CFR 1031.9 should be balanced against Commission priorities, available resources, and the need for greater staff involvement, among other things. Nominations for leadership roles will be subject to the rules set by the standards development organization, and an OEX decision will be rendered in a timely manner.

Comment 24: Commenters strongly encouraged the Commission to ensure that the personnel assigned to participate in voluntary standards development groups have the technical qualifications to address the entire subject of the standard, as opposed to a political appointee without relevant background training. Another commenter echoed this concern and also recommended that staff participation should involve regular attendance at meetings so that any votes cast by staff would be fully informed.

Response 24: Staff members approved by OEX to hold leadership positions will be qualified to fulfill the responsibilities of their positions. CPSC's regulation at 16 CFR 1031.12 prohibits certain Commission personnel who have final decision-making responsibilities, such as political appointees, from becoming members of a voluntary standards development group.

Comment 25: A commenter suggested that the procedures governing the chairman of a voluntary standards committee only allow that person to vote when there is a tie on a proposal. The commenter claimed that this would undermine one of the objectives of the rule.

Response 25: The chairman's role in a voluntary standard committee is defined by each organization's by-laws, policies, and procedures. Anyone from CPSC staff taking a leadership role in a standards organization is required to adhere to those bylaws and policies. If this role is defined in standards organization bylaws and policies as one of a facilitator, then, staff will work to facilitate open discussion and debate, in accordance with the defined role of a chairman, and will avoid casting a vote when in that role.

Comment 26: Some commenters expressed concern that the proposed rule could affect the ability of staff to monitor and informally participate in the greatest number of voluntary standards. Leadership roles demand significant resources and administrative responsibilities that may not be of significant interest to the Commission.

Response 26: The Commission understands and agrees that leadership roles can be demanding and that the Commission's resources are limited. Some leadership roles, such as leading a small task group, may take less time and fewer resources and be an appropriate use of staff's time. For a staff member already committed to participating in a task group, serving as chairman may not involve a significant amount of extra time and preparation. However, as noted previously, resource demands and availability will be factors considered by the OEX when deciding on a request for staff to hold a leadership position.

Comment 27: A commenter noted that the policy of limited staff participation in voluntary standards development activities was, in part, to reduce the financial burden on the government. The commenter did not see how lifting the prohibitions on staff participation in voluntary standards development activities would reduce the financial burdens on the government.

Response 27: The final rule allows staff participation in a leadership role on a voluntary standards development group with OEX approval after taking into consideration a variety of factors, which may include resource availability. The level of participation in the voluntary standards process and the necessary commitment of time and resources can vary from situation to situation, and will be taken into account by OEX in considering approval. Implementing or revising mandatory standards can be costly in terms of the time and resources required to achieve a product safety objective. Participation in the voluntary standards development process is often a cost-efficient means to achieve the Commission's product safety objectives when the result is an effective standard with industry compliance. Implementing or revising an effective voluntary standard is in the interest of the Commission, consumers, and the industry.

Comment 28: A commenter expressed concern that using staff in leadership roles could slow down the development of voluntary standards because those staffers would need to maintain their daily duties at the Commission.

Response 28: Before approving staff to serve in a leadership position, the OEX will consider many factors, including the employee's then current duties and activities. Leaders in voluntary standards development groups typically have other duties at their place of employment, and if a leader is unable to fulfill his/her duties, the standards organization has procedures for replacing the leader to get the work completed on a timely basis. These procedures will apply to staff in leadership roles as well. For standards organizations that use volunteers in leadership roles (rather than voluntary standards development groups led by paid employees like UL), having another committee member who is allowed to volunteer for leadership duties will be beneficial during times of increased activity.

Comment 29: Several commenters noted that if staff took leadership positions in voluntary standards activities and the government was shut down, then the standards development process would be slowed down.

Response 29: Government shut downs are not common; however, the inability of staff to participate in voluntary standards activities based on this situation are similar to other circumstances, such as health-related issues, which can prohibit any person from fulfilling their duties on a committee. In the event of a leadership lapse, voluntary standards organizations have standing procedures for replacing leaders who cannot complete their duties.

III. Description of the Final Rule

Following is a section-by-section description of the changes to part 1031. These changes are the same as those set out in the proposed rule.

Section 1031.10(b) – Existing § 1031.10(b), regarding definitions, lists the types of activities that may comprise “employee involvement” in voluntary standards development activities. Section 1031.10(b) of the final rule expands the list of activities to include: “participating as a voting member of, or in a leadership position on, a voluntary standard development group, when authorized,” to recognize that such activities are part of the term “employee involvement.”

Section 1031.11(c) – Existing § 1031.11(c), regarding procedural safeguards, states that involvement in voluntary standards activities by Commission officials and employees is predicated on an understanding by the voluntary standards group that such involvement is on a non-voting basis. The final rule deletes this provision as inconsistent with the goal of allowing employees the option, with prior approval, to participate as voting members of a voluntary standards committee.

Section 1031.11(d) – Existing § 1031.11(d), regarding procedural safeguards, states: “[i]n no case shall Commission employees or officials vote or otherwise formally indicate approval or disapproval of a voluntary standard during the course of a voluntary standard development process.” The final rule renumbers this section to § 1031.11(c), and revises the content to remove the existing language, which is inconsistent with allowing Commission employees the option, with prior approval, to vote. The final rule provides that employees authorized to participate as voting members of a voluntary standard development group represent the position of CPSC staff. Such votes do not necessarily represent the opinions or views of the Commission, and would not be binding on the Commission.

Section 1031.11(e) – Existing § 1031.11(e), on procedural safeguards, states that Commission officials and employees cannot accept voluntary standards committee leadership positions, except that the Voluntary Standards Coordinator may accept leadership positions with the governing bodies of standards-making entities with the approval of the Executive Director. The final rule renumbers this provision to § 1031.11(d), and revises the language to state that Commission officials or employees may accept leadership positions in voluntary standards development groups or leadership positions with the governing bodies of standards-making entities, when authorized with prior approval by the Office of the Executive Director.

Section 1031.11(f) – The final rule renumbers existing § 1031.11(f) to § 1031.11(e).

Section 1031.12(b) – Existing § 1031.12(b), on membership criteria, states that all officials and employees not discussed in § 1031.12(a) [which lists Commissioners and employees who may not become members of voluntary standards groups because they either make or advise on final agency decisions] may be advisory, non-voting members of voluntary standards development and advisory groups with the prior approval of the Executive Director,

including the Voluntary Standards Coordinator. Section 1031.12(b) of the final rule revises the language to provide that all other officials and employees not covered under § 1031.12(a) may participate as voting members or accept leadership positions in voluntary standard development groups, when authorized with the prior approval of the Office of the Executive Director. Section 1031.12(b) of the final rule removes the reference to the Voluntary Standards Coordinator because such person is not prohibited from becoming a member of a voluntary standards group in § 1031.12(a). Thus, the Voluntary Standards Coordinator would fall within the class of persons discussed in final § 1031.12(b) who may serve as a voting member and hold leadership positions, as authorized.

Section 1031.12(c) – Existing § 1031.12(c) references the Executive Director as the management official with the authority to approve staff serving as members of a voluntary standards organization or group. Section 1031.12(c) of the final rule removes the reference to the “Executive Director” and replaces it with “Office of the Executive Director” to reflect that prior approval for membership in voluntary standards activities must be approved by the Office of the Executive Director.

IV. Environmental Impact

Generally, the Commission’s regulations are considered to have little or no potential for affecting the human environment, and environmental assessments and impact statements are not usually required. *See* 16 CFR 1021.5(a). This final rule solely involves Commission procedure, and therefore, is not expected to have an adverse impact on the environment. The final rule generally falls within the categorical exclusion in 16 CFR 1021.5(c), eliminating the need for an environmental assessment or environmental impact statement.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”) requires agencies conduct regulatory impact analyses to assess the potential economic impact on small entities, including small businesses, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Commission provided such a certification in the NPR because the rule would not impose any new requirements on businesses, including small businesses nor require any greater governmental participation in voluntary standards. The Commission did not receive any comments related to the certification, and the final rule does not differ from the proposed rule. Accordingly, the Commission finds that the final rule will not have a significant impact on a substantial number of small entities.

VI. Paperwork Reduction Act

The final rule does not require any stakeholder to create, maintain, or disclose information. Thus, the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) is not implicated in this rulemaking.

VII. Effective Date

The APA generally requires that the effective date of a rule be at least 30 days after publication of a final rule. 5 U.S.C. 553(d). Because the final rule solely affects Commission procedure and does not require stakeholders to take any action, the final rule is effective 30 days after publication in the *Federal Register*.

List of Subjects in 16 CFR Part 1031

Business and industry, Consumer protection, Voluntary standards.

For the reasons stated in the preamble, the Commission amends 16 CFR part 1031 as follows:

PART 1031—COMMISSION PARTICIPATION AND COMMISSION EMPLOYEE INVOLVEMENT IN VOLUNTARY STANDARDS ACTIVITIES

1. The authority citation for part 1031 is revised to read as follows:

AUTHORITY: 15 U.S.C. 2051–2083; 15 U.S.C. 1261–1276; 15 U.S.C. 1191–1204; Sec. 3, 104, 106, 223 Pub. L. 110-314, 122 Stat. 3016, 3017 (2008), Sec. 3, 4 Pub. L. 112-28 (2011).

2. In § 1031.10 paragraph (b), revise the third sentence to read as follows:

§ 1031.10 Definitions.

* * * * *

(b) * * * Employee involvement may include regularly attending meetings of a standards development committee or group, taking an active part in discussions and technical debates, expressing opinions, expending other resources in support of a voluntary standard development activity, and participating as a voting member of, or in a leadership position on, a voluntary standard development group, when authorized. * * *

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3. In § 1031.11, remove paragraph (f) and revise paragraphs (c), (d), and (e) to read as follows:

§ 1031.11 Procedural safeguards.

* * * * *

(c) Commission officials or employees who are authorized to participate as a voting member of a voluntary standard development group represent the position of CPSC staff. Such

votes or opinions do not bind the Commission in any way or necessarily represent the opinions or views of the Commission, but rather, solely represent the views of the CPSC staff.

(d) Commission employees and officials who are involved in the development of voluntary standards may accept leadership positions in voluntary standard development groups (e.g., committee chairman or secretary) or leadership positions with the governing bodies of standard-making entities, when authorized with the prior approval of the Office of the Executive Director.

(e) Attendance of Commission personnel at voluntary standards meetings shall be noted in the public calendar, and meeting summaries shall be submitted to the Office of the Secretary, as required by the Commission's meetings policy, 16 CFR part 1012.

4. In § 1031.12:

a. Revise paragraph (b).

b. In paragraph (c), remove the phrase: "Executive Director," and add in its place "Office of the Executive Director".

The revision reads as follows:

§ 1031.12 Membership criteria.

* * * * *

(b) All other officials and employees not covered under § 1031.12(a) may participate as voting members or accept leadership positions in voluntary standard development groups, when authorized with the prior approval of the Office of the Executive Director.

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Dated: January 27, 2016

Todd A. Stevenson,
Secretary, Consumer Product Safety Commission

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